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Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress

Note by the secretariat

Pursuant to a decision of the United Nations Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 112), Edward John, a member of the Forum, undertook a study of the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, with reference to the Declaration, and particularly to articles 26 to 28, 32 and 40. The outcome of the study is hereby submitted to the Permanent Forum at its thirteenth session.

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Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress

I. Introduction

1. The members of the Permanent Forum examined the Doctrine of Discovery as a special theme during its eleventh session, which included the convening of a panel of international experts, the preparation of a conference room paper, statements from indigenous peoples from Africa, Asia, the Pacific, the Arctic, Central and South America and the Caribbean and North America[1] and recommendations in the final report of the Forum on the session (see E/2012/43, chap. III). The reach and impacts of the Doctrine are global.

2. There is a substantial body of scholarly work[2] on the historical foundations of the doctrine and the ongoing effects on indigenous peoples globally. It is therefore not the intention of the present study to repeat that valuable work, but rather to build upon it so as to create a better understanding of the doctrine and its continuing impacts. The challenge is to shift the paradigm. The Doctrine has been rejected by some international and domestic bodies but continues to have life. Its resilience remains because it is embedded in colonizing cultures and maintained in State laws, policies, negotiations and litigation positions.

3. The Doctrine of Discovery is based invalidly on the presumption of racial superiority of Christian Europeans.[3] It originated with the papal bulls issued during the so-called Age of Discovery in Europe. It was compounded by regulations, such as the *Requerimiento*, that emanated from royalty in Christian European States.[4] In all its manifestations, "discovery" has been used as a framework for justification to dehumanize, exploit, enslave and subjugate indigenous peoples and dispossess them of their most basic rights, laws, spirituality, worldviews and governance and their lands and resources. Ultimately it was the very foundation of genocide.[5]

4. Doctrines of superiority, such as discovery, have been repudiated as "racist, scientifically false, legally invalid, morally condemnable and socially unjust".[6] The

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[1] Available from www.docip.org.

[2] See, e.g., Robert J. Miller and others, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford/New York, Oxford University Press, 2012); Charles Geisler, "New terra nullius narratives and the gentrification of Africa's empty lands", (2012), *Journal of World Systems Research*, vol. 18, No. 1; Robert A. Williams, Jr., *Savage Anxieties: The Invention of Western Civilization* (New York, Palgrave Macmillan, 2012); Robert J. Miller, "The international law of colonialism: a comparative analysis", *Lewis & Clark Law Review*, vol. 15 (2011); and Steven T. Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, Colorado, Fulcrum Press, 2008).

[3] Steven T. Newcomb, "The evidence of Christian nationalism in federal Indian law: the Doctrine of Discovery, *Johnson v. McIntosh*, and plenary power", *New York University, Review of Law & Social Change*, vol. 20 (1993).

[4] Robert J. Miller and others, (see footnote 2 above).

[5] See, e.g., Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (New York, Oxford Publishing, 1990).

[6] Declaration, fourth preambular paragraph, "similarly, see the *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble.

prohibition against racial discrimination is a peremptory norm.[7] The Human Rights Council, in paragraph 5 of its resolution 18/15 on the incomptability between democracy and racism, "condemned" doctrines of superiority as "incompatible with democracy and transparent and accountable governance" (see A/66/53/Add.1, chap. I). For both indigenous peoples and States, there are compelling reasons to go beyond repudiation. It is essential to replace the colonial Doctrine of Discovery with contemporary international human rights standards and engage in just and collaborative processes of redress. High courts in various States have expressly discredited the doctrines of Discovery and of *Terra nullius*, which underpin the de facto dispossession of indigenous lands and laws.[8] Yet these same States continue applying those doctrines. Even State laws that affirm and protect indigenous land rights and legal orders are not being respected and implemented by these same States. Large "gaps" remain between State commitments to recognize indigenous rights and their full and effective implementation and realization.

5. The Secretary-General has stated that the United Nations Declaration on the Rights of Indigenous Peoples provides a principled framework "on which States can build or rebuild their relationships with indigenous peoples".[9] The Declaration is a universal, remedial human rights instrument. As described by the Expert Mechanism on the Rights of Indigenous Peoples, as a "normative expression of the existing international consensus regarding the individual and collective human rights of indigenous peoples, the Declaration provides a framework for action aiming at the full protection and implementation of the rights of indigenous peoples".[10]

6. The General Assembly, in paragraph 1 of its resolution 2621 (XXV), indicated that the continuation of colonialism is a crime which constitutes a violation of the Charter of the United Nations and the principles of international law. Colonial-era doctrine cannot continue to oppress and impoverish generations of indigenous peoples and deny them jurisdiction to exercise their indigenous laws and legal orders.

7. It is critical to examine how Crown sovereignty and underlying title could ever have legitimately crystallized through the "discovery" of indigenous peoples' lands and territories. The Doctrine must be unmasked so its manifestations are made visible. As Tracey Lindberg concluded, "Crown sovereignty could not replace Indigenous sovereignty just by virtue of non-Indigenous peoples settling in Indigenous territories and homelands ... you must assume Indigenous inability, absence, and invisibility in order to imagine the crystallization of Crown sovereignty and superior title".[11] In the different regions of the world, "assumed"

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[7] See the report of the Study Group of the International International Law Commission, entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" (A/CN.4/L.702), para. 33; and Antonio Cassese, *International Law* (Oxford/New York: Oxford University Press, 2001).

[8] *Mabo* v. *State of Queensland* (No. 2) (1992), 175 C.L.R. 1 (H.C.), paras. 28-29, 40 and 43 per Justice Brennan; and *Simon* v. *The Queen*, [1985] 2 S.C.R. 387.

[9] Message of the Secretary-General for the International Day of World's Indigenous People, 23 July 2008.

[10] Report of the Expert Mechanism on the Rights of Indigenous Peoples, final report of the study on indigenous peoples and the right to participate in decision-making (A/HRC/18/42), annex, advice No. 2 (2011), para. 4.

[11] Tracey Lindberg, "Contemporary Canadian resonance of an imperial Doctrine", in Robert J. Miller and others (see footnote 2 above). See also John Borrows, "Sovereignty's alchemy: an

sovereign powers continue to be abused by States that derived justification by these doctrines. As underlined by Robert A. Williams, "this blatantly racist European colonial-era legal doctrine continues to be used by courts and policy makers in the West's most advanced nation-States to deny indigenous peoples their basic human rights guaranteed under principles of modern international law".[12]

8. Every Member State must respect and apply the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations.[13] State reliance on the Doctrine of Discovery and the denial of indigenous sovereignty and self-determination are incompatible with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith, which are the core principles for interpreting and applying indigenous peoples' rights and the related State obligations affirmed in the Declaration (art. 46(3)). Here as well, the adoption of the Declaration by the General Assembly notwithstanding, the "gaps" between commitments and implementation continue to be significant.

9. With regard to land dispossessions, forced conversions of non-Christians, the deprivation of liberty and the enslavement of indigenous peoples, the Holy See reported that an "abrogation process took place over the centuries" to invalidate such nefarious actions.[14] Such papal renunciations do not go far enough. There is a pressing need to decolonize from the debilitating impacts and the ongoing legacy of denial by States of indigenous peoples' inherent sovereignty, laws, and title to their lands, territories and resources. At the same time, there is a growing movement among faith-based bodies to repudiate the doctrine of discovery.[15] In that context, the World Council of Churches and Canadian Quakers have both emphasized indigenous peoples' inherent sovereignty and title concerns.

II. Impacts of the Doctrine of Discovery

10. The impacts of the Doctrine of Discovery continue to be devastating, far-reaching and intergenerational. The Special Rapporteur on the rights of indigenous peoples, James Anaya, concluded in his report that "the colonial-era doctrine of discovery, when coupled with related doctrines of conquest and European racial superiority, was a driving force for atrocities committed against indigenous peoples on a global scale, with the consequences continuing to be felt" (see A/HRC/21/47, para. 5).

11. The Permanent Forum, in its report on the eleventh session, described some of the ongoing adverse effects in indigenous communities as relating to "health;

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analysis of *delgamuukw v British Columbia*" (1999), *Osgoode Hall Law Journal*, vol. 37, "What alchemy transmutes the basis of Aboriginal possession into the golden bedrock of Crown title?"

[12] Robert A. Williams, Jr., *Savage Anxieties: The Invention of Western Civilization* (New York, Palgrave Macmillan, 2012).

[13] Arts. 1(2) and 55 c; see also Declaration, preambular paras. 1-2, and arts. 1-3.

[14] Statement by the Permanent Observer Mission of the Holy See to the United Nations to the Permanent Forum at its ninth session, 27 April 2010.

[15] To date, statements have been issued by the World Council of Churches and denominations, including Episcopalian/Anglican, Unitarian, United Church of Canada and Religious Society of Friends (Quakers). See, e.g., www.oikoumene.org/en/resources/documents/executive-committee/2012-02/statement-on-the-doctrine-of-discovery-and-its-enduring-impact-on-indigenous-peoples.

psychological and social well-being; denial of rights and titles to land, resources and medicines; conceptual and behavioural forms of violence against indigenous women; youth suicide; and the hopelessness that many indigenous peoples experience, in particular indigenous youth" (see E/2012/43-E/C.19/2012/13, para. 5). The visual impacts of dispossession and oppression, such as the conditions in many indigenous communities and the resulting social problems, serve to perpetuate stereotypes. Racism and discrimination and notions of non-indigenous superiority, whether overt or otherwise, will continue so long as severe poverty remains in communities.

12. In the preamble to the outcome document of the Global Indigenous Preparatory Conference for the United Nations World Conference on Indigenous Peoples, which took place in Alta, Norway, from 8 to 13 June 2013 (see A/67/994, annex), the impacts of colonial doctrines are described by indigenous peoples as including the ongoing usurpation of indigenous peoples' lands, territories, resources, the destruction of indigenous political and legal institutions, discriminatory practices aimed at destroying indigenous cultures; the failure to honour treaties, agreements and other constructive arrangements with indigenous peoples and nations; genocide, the loss of food sovereignty and crimes against humanity.

13. The highest court of Canada has recognized the need for reconciliation of "pre-existing aboriginal sovereignty with assumed Crown sovereignty".[16] The Supreme Court has taken judicial notice of "such matters as colonialism displacement and residential schools",[17] which demonstrate how "assumed" sovereign powers were abused throughout history. The root cause of such abuse leads back to the Doctrine of Discovery and other related fictitious constructs, which therefore must be addressed.

14. As affirmed in the Declaration, the ongoing denial by States of indigenous peoples' sovereignty leads to a denial of their human rights. These include, among other things, the right of self-determination, including the right to self-government through their own laws and jurisdiction (arts. 3, 4, 5, 33 and 34); right to own, develop and control their lands, territories and resources (art. 26); and right to development in accordance with their own priorities (arts. 20 and 23) and treaties (art. 37). As a result of colonial doctrines and policies, indigenous peoples are among the most marginalized and disadvantaged in the world. The General Assembly endorsed the following statement: "Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development".[18] The United Nations Children's Fund (UNICEF) has declared that "poverty is a denial of human rights and human dignity".[19]

III. Redress: implementation of a human rights-based approach

15. In order to redress the ongoing debilitating consequences of the doctrine of discovery, it is imperative that a human rights-based approach be adopted, which affirms that "indigenous peoples are equal to all other peoples" and that "all peoples

[16] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.
[17] *R.* v. *Ipeelee*, 2012 S.C.C. 13, para. 60.
[18] General Assembly resolution 66/288, annex, para. 2.
[19] UNICEF, *Poverty Reduction Begins with Children*, New York, March 2000.

contribute to the diversity and richness of civilizations and cultures".[20] The Doctrine of Discovery was used as a tool to justify conferring upon States the "exclusive power to extinguish" indigenous rights on an ongoing basis.[21] The pre-existing inherent sovereignty of indigenous peoples was not justly considered. In various parts of the world, domestic courts have aided States not only by validating such destructive acts, but also by extinguishing indigenous rights through judicial rulings.[22]

16. Indigenous peoples' inherent rights are human rights and are not subject to extinguishment or destruction in form or result.[23] According to United Nations treaty bodies, the extinguishment of indigenous peoples' rights is incompatible with their right of self-determination.[24] Further, the Committee on Economic, Social and Cultural Rights concluded that "policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued".[25] The International Court of Justice has ruled that "great weight" should be ascribed to the interpretations adopted by independent bodies established specifically to supervise the application of human rights treaties.[26] The Court added that the same is true in respect of supervisory regional bodies, such as the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights. The United Nations and regional bodies are increasingly using the Declaration to interpret and apply indigenous peoples' rights and related State obligations in existing treaties.

17. Human rights are generally relative in nature and not absolute. The Declaration affirms, in article 46, paragraph 2, that the exercise of the rights in the Declaration shall be "subject only to such limitations as are ... in accordance with international human rights obligations ... and strictly necessary solely for the purpose of securing due recognition and respect for the rights ... of others and for meeting the just and most compelling requirements of a democratic society".[27] The Special Rapporteur on the rights of indigenous peoples underlined in paragraph 29 of his report on the situation of indigenous peoples in Australia (A/HRC/15/37/Add.4) that the "extinguishment of indigenous rights in land by unilateral uncompensated acts" is "incompatible with the Declaration, as well as with other international

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[20] Declaration, preambular paras. 2 and 3.

[21] *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

[22] *Tsilhqot'in Nation* v. *British Columbia*, 2012 B.C.C.A. 285 (broad territorial claims to title are "antithetical to the goal of reconciliation"). The case is currently under appeal to the Supreme Court of Canada.

[23] Human rights instruments do not permit the destruction of human rights. See, e.g., identical art. 5(1) of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights; and art. 45 of the Declaration.

[24] See, e.g., concluding observations of the Human Rights Committee: Canada (CCPR/C/79/Add.105), para. 8.

[25] E/C.12/1/Add.31, para. 18.

[26] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*. The Court indicated that the jurisprudence of treaty bodies would include their "General Comments" and their concluding observations regarding individual States Parties.

[27] See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, twenty-seventh activity report, 2009, annex 5, paras. 213-215.

instruments".[28] With regard to the lands, territories and resources of indigenous peoples "taken ... or damaged without their free, prior and informed consent", the Declaration, in article 28, affirms their right to redress. This includes restitution "or, when this is not possible, just, fair and equitable compensation".

18. The Declaration affirms that indigenous peoples and individuals have the "right not to be subjected to forced assimilation or destruction of their culture" (art. 8(1)). In this regard, States have a duty to provide effective mechanisms for the prevention of, and redress for, any action which has the aim or effect of "depriving them of their integrity as distinct peoples, or of their cultural values" or "dispossessing them of their lands, territories and resources" (art. 8(2)). The Special Rapporteur stated in paragraph 45 of his report (A/64/338) that the Declaration also affirms that indigenous peoples have the right to cultural integrity, "including cultural and spiritual objects, languages and other cultural expressions"[29] which is intimately linked to their lands, territories and resources. The study by the Expert Mechanism on the Rights of Indigenous Peoples states, in its advice No. 5 (see A/HRC/24/50, annex), that the Declaration "affirms the right to the integrity of their lands and territories" (arts. 25-32), which includes protection of the environment.

19. The International Law Association concluded that "indigenous peoples have the rights to reparation and redress for the wrongs suffered. This right amounts to a rule of customary international law to the extent that it is aimed at redressing a wrong resulting from a breach of a right that is itself part of customary international law. In fact, redress is an essential element for the effectiveness of human rights".[30] Examples of customary international law in the Declaration include, among other things, the general principle of international law of *pacta sunt servanda* ("treaties must be kept", fourteenth preambular para. and art. 37); the prohibition against racial discrimination (art. 2); the right to self-determination (art. 3); the right to one's own means of subsistence (art. 20); and the right not to be subjected to genocide (art. 7). The Association adds that "States must comply — pursuant to customary and, where applicable, conventional international law — with the obligation to recognize, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources".[31]

20. In its resolution 67/157, the General Assembly recognized that universal realization of the right of all peoples to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights.

IV. Redress: processes and mechanisms

21. In order to achieve redress in the global indigenous context, effective processes and mechanisms will be required at international, regional and domestic levels. Currently, for example, there are no effective international mechanisms for

[28] See *Case of Sawhoyamaxa* v. *Paraguay*, Inter-American Court of Human Rights (Ser. C) No. 146 (2006), para. 128.

[29] See arts. 11-16 and 31 of the Declaration.

[30] International Law Association, "Rights of indigenous peoples", Interim report of The Hague Conference (2010).

[31] "Rights of indigenous peoples", final report of the Sofia Conference (2012), (Conclusions and Recommendations).

remedying State violations of treaties, agreements and other constructive arrangements. The Inter-American Court has confirmed that "it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it".[32] Reparations "consist of measures that tend to make the effects of the violations committed disappear",[33] including measures such as restitution.

22. The International Law Association has concluded that "States must comply with the obligation — according to customary and, where applicable, conventional international law — to recognize and fulfil the right of indigenous peoples to reparation and redress for the wrongs they suffered, in particular their lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress — established in conjunction with the peoples concerned — must be available and accessible in favour of indigenous peoples."[34] Any ongoing actions based in discovery are in violation of States' international obligations. Redress must include decolonization processes that effectively restore indigenous peoples' sovereignty and jurisdiction in contemporary contexts and achieve genuine reconciliation.

23. In the global perspective, different processes of redress are required for different political and historical contexts. Within the United Nations, trust territories and Non-Self-Governing Territories have been the subject of special decolonization processes, which have their own particular limitations and serious injustices.[35] In countless other situations worldwide, indigenous peoples are striving for effective reconciliation in diverse ways. Within existing States, the key issues urgently requiring resolution are those relating to making jurisdictional space for indigenous sovereignty,[36] and self-determination, including the effective operation of distinct indigenous legal orders over their territories.

24. According to the study on the rights of indigenous peoples and truth commissions and other truth-seeking mechanisms on the American continent (E/C.19/2013/12), truth commissions are an essential tool in identifying the causes of serious human rights violations, including economic, social and cultural rights; determining patterns of abuse; and preventing a repetition of similar acts. The study states that "if properly implemented, with strong guarantees of independence and honest leadership, the commissions could help to strengthen recognition of the sovereignty, identity and perspective of indigenous peoples and respect of their civil, political, economic, social, spiritual and cultural rights, as well as the right to ancestral lands and natural resources" (ibid., para. 71).

25. Many States continue to ignore human rights challenges to their "assumed" sovereignty over indigenous peoples and their territories. Former Chief Justice Lance Finch of the British Columbia Court of Appeal emphasized

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[32] *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001, Ser. C No. 79 (2001), para. 163.

[33] *Case of the Indigenous Community Yakye Axa*, Inter-American Court of Human Rights, Ser. C. No. 125 (Judgment) 17 June 2005, para. 182.

[34] International Law Association, 2012 (see footnote 31 above).

[35] See, e.g., E/C.19/2013/12.

[36] Courtney Jung, "Transitional justice for indigenous people in a non-transitional society", International Center for Transitional Justice, October 2009, at p. 3: "one of the historic injustices that lie at the heart of indigenous identity is loss of sovereignty. Indigenous peoples are defined in part by the fact that their sovereignty was not recognized by colonial powers that appropriated territory and sovereignty under the doctrine of *terra nullius*."

> "To guard against imbalance and resulting injustice, we must conceive of reconciliation, in the legal context as well as in social and political terms, as a two-way street: just as the pre-existence of aboriginal societies must be reconciled with the sovereignty of the Crown, so must the Crown, in its assertion of sovereignty, equally be reconciled with the pre-existence of aboriginal societies".[37]

26. As affirmed in article 40 of the Declaration, "indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights". Indigenous rights to just and fair procedures and to effective remedies for all infringements apply not only to States, but also to business enterprises and other third parties. Under international law, States must take positive measures to ensure the indigenous right to an effective remedy not only against their own actions, but also against the acts of other parties within their own State.[38] The Permanent Forum, in its report on the eleventh session, reiterated that international human rights law, including norms on equality and non-discrimination demand that States rectify past wrongs caused by such doctrines, including the violation of the land rights of indigenous peoples, through law and policy reform, restitution and other forms of redress for the violation of their land rights (E/2012/43-E/C.19/2012/13, para. 7).

V. Role of domestic courts

27. Although some domestic courts acknowledge the colonial origins of "assumed" State sovereignty over indigenous peoples and their traditional territories, they have failed to give full and fair consideration to pre-existing indigenous sovereignty.[39] State sovereignty is not absolute.[40] Within their respective countries, domestic courts generally have legal authority and a constitutional responsibility to determine and enforce constraints on State sovereignty so as to ensure jurisdictional space for indigenous sovereignty, laws and legal orders. The extraterritorial actions of States are also constrained by their international human rights obligations.[41]

28. In *Mabo et al.* v. *State of Queensland* [No. 2], in striking down the doctrine of *terra nullius* in Australia, it was held that "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".[42] The same rationale must apply to the whole Doctrine of

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[37] Hon. Lance Finch, "The duty to learn: taking account of indigenous legal orders in practice", Continuing Legal Education Society of British Columbia Indigenous Legal Orders and the Common Law Conference, 15 November 2012.

[38] See, e.g., CCPR/C/21/Rev.1/Add.5, para. 6.1.

[39] See, e.g., Brian Slattery, "Aboriginal sovereignty and imperial claims", *Osgoode Hall Law Journal*, vol. 29: "native American peoples held sovereign status and title to the territories they occupied at the time of European contact and that this fundamental fact transforms our understanding of everything that followed".

[40] A/47/277, para. 17: "The time of absolute and exclusive sovereignty ... has passed; its theory was never matched by reality."

[41] See, e.g., A/60/350, para. 30.

[42] *Mabo et al.* v. *State of Queensland* [No. 2], (1992) 107 A.L.R. 1 (High Court of Australia), per Brennan J.

Discovery. At the same time, there is an ongoing reluctance among States to eliminate all reliance on the Doctrine.[43] "Assumed" State sovereignty is being abused in different regions of the world, especially when indigenous lands, territories and resources are involved.[44] Thus it is urgent for domestic courts to repudiate and provide remedies for harmful colonial doctrines and further elaborate a judicial framework that is consistent with the Declaration and other contemporary international human rights law. In addition, there is a need for indigenous perspectives in judicial decision-making, through the appointment of indigenous justices and the maintenance, support and development of indigenous courts with jurisdiction to make decisions in accordance with indigenous laws, cultures and international human rights standards.

VI. Need for human rights education

29. Genuine reconciliation is not possible without a clear understanding of, and sensitivity to, past and present injustices relating to indigenous peoples. In view of the legal fictions generated by "discovery" and other related doctrines, there is an urgent need to ensure that curricula include the historical realities of the founding of modern nation States. Students at all levels should learn about the impacts of such doctrines and the need for justice and redress. Further, in view of the entrenched and often unconscious ways the doctrines are embedded in State legal and political culture, there is a need for education of State law makers and decision makers.

30. National human rights institutions can play a role by developing and promoting human rights education through culturally appropriate materials. Such materials must be developed in consultation and cooperation with indigenous peoples. In the United Nations Declaration on Human Rights Education and Training (General Assembly resolution 66/137, annex), the General Assembly affirmed the importance of such education and training and the roles of States and other actors in their implementation. Human rights education materials should also be created and distributed at the international level through the Office of the United Nations High Commissioner for Human Rights and appropriate United Nations agencies and bodies, including the Permanent Forum and the Expert Mechanism on the Rights of Indigenous Peoples.

31. The Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, emphasized in her report that "it is necessary to avoid the biased or flawed premise that judicial actors have already obtained the necessary knowledge that will enable them to perform their duties in an impartial manner".[45] Such legal professionals should be requested to take courses on international human rights law, including the Declaration. These courses should be made widely available, especially by bar associations and universities.

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[43] For example, A/HRC/21/47/Add.1, para. 16: "the use of notions of discovery and conquest to find Indians rights diminished and subordinated to plenary congressional power is linked to colonial era attitudes toward indigenous peoples that can only be described as racist".

[44] Ibid., para. 34: "natural resource extraction and development on or near indigenous territories had become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights".

[45] A/HRC/20/20, para. 94 (conclusions). "Judicial actors" are said to include: judges, magistrates, prosecutors, public defenders and lawyers.

VII. Conclusions and recommendations

32. The Doctrine of Discovery is significant globally not only for abuses in the past, but also for its ongoing far-reaching consequences. Such colonial doctrines must not prevail in practice over human rights, democracy and the rule of law. In this context, the implementation gap must be addressed fully and effectively so that such doctrines are wholly eliminated. According to Robert J. Miller, "discovery is a dangerous fiction that if not tackled will continue to undermine attempts to create a better, reconciled Crown-Indigenous future".[46]

33. Domestically, fundamental changes must be reflected through constitutional and legislative reforms, policies, and government negotiation mandates in regard to indigenous peoples. State Governments must be constrained from the illegal taking of indigenous lands, territories and resources justified by these doctrines.[47]

34. Processes and mechanisms of redress, as well as independent oversight, are required at international, regional and domestic levels. Decolonization processes must be devised in conjunction with indigenous peoples concerned and compatible with their perspectives and approaches. Such processes must be fair, impartial, open and transparent, and be consistent with the Declaration and other international human rights standards.

35. Such processes should encourage peace and harmonious and cooperative relations between States and indigenous peoples. Where desired by indigenous peoples, constitutional space must be ensured for indigenous peoples' sovereignty, jurisdiction and legal orders.

36. Within their respective mandates, United Nations treaty bodies and regional human rights bodies have an important role to play in establishing relevant standards and jurisprudence. Similarly, the Permanent Forum, the Expert Mechanism on the Rights of Indigenous Peoples and United Nations Special Rapporteurs should play a role. The universal periodic review should also be used to encourage States to engage together with indigenous peoples in processes of decolonization.

37. The upcoming World Conference on the Rights of Indigenous Peoples provides an opportunity for further examination of the topic. The United Nations and States will have an appropriate and timely occasion in the outcome document to wholly repudiate colonial doctrines and to commit to processes of redress.

38. History cannot be erased. Its course, however, can be changed to ensure the present and future well-being, dignity and survival of indigenous peoples. Dignity and respect for human rights must be guaranteed, especially in the light of existing vulnerabilities. There must be a full and honest account of the past, in order to ensure that colonial doctrines do not continue to be perpetuated. A clear shift of paradigm is critical from colonial doctrines to a principled human rights framework, consistent with the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law.

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[46] Robert J. Miller and others (see footnote 2 above).

[47] See, e.g., E/C.19/2013/20.